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Reflections about the technical monitoring of workers at sea.¹

Cédric Leboeuf

PHD in Law, Researcher at Maritime and Oceanic Law Centre ;

ERC [Human Sea Project](#), Nantes University, France ;

Institut Universitaire Mer et Littoral - FR-CNRS n°3473.

Associate member, Corbett Centre for Maritime Policy Studies, King's College London, UK.

Résumé

Si les études existantes rapportent des éléments tout à fait pertinents s'agissant de la surveillance des salariés par leur entreprise, rares sont celles évoquant cette pratique en mer, à bord des navires. Une attention particulière est ici consacrée aux conséquences de la surveillance sur les conditions de travail de salariés bénéficiant d'une autonomie fonctionnelle, dans un environnement tout à fait singulier, où vie privée et vie professionnelle s'entremêlent, jusqu'à parfois interroger l'existence même d'une distinction des deux sphères. Pourtant, la dichotomie reste essentielle au regard du droit du travail qui consacre notamment le bien-être et la qualité de vie au travail des salariés. Elle est l'objet d'infléchissements justifiés par les particularismes tant des activités salariées en mer, du milieu de travail que des finalités poursuivies par les dispositifs de surveillance.

Abstract

If existing studies state some relevant elements about employee surveillance by the enterprise, rare are the ones analysing such a practice at sea, on board ships. In this context, particular attention is drawn to the consequences on working conditions of the workers who are granted functional autonomy, in a singular environment where private and working lives are mixed up. One could even question the distinction of the two spheres. However, the dichotomy remains crucial for French labour law, which enshrines in particular employee well-being. Particularities arising from the very human activities at sea, the working environment and the purposes of the monitoring and security devices justify some adjustments.

¹ The French version of this paper is to be published in *Droit maritime français*.

The ship is a confined space, subject to the dangers of navigation, whose mobility and isolation accentuate the dangerous nature of the work and the risk of accidents. Life aboard, combining work and rest in the same place, leads to focus on work organization, composition and size of the crew. Safety, i.e. enhancement of the working conditions on board, falls within the habitability of the ship and the safety of life at sea.

In this context, monitoring is both a security and subordination element: the employee must follow the orders and instructions of his employer. The surveillance measures pursue thus different objectives such as safety, security, and control of the application of regulations or improvement of commercial operations. Monitoring of workers at sea, traveling and enjoying more or less autonomy, is to ensure the safety of the crew, cargo and commercial exploitation. This triple purpose of monitoring the ship and persons on board is the result of shipowners' obligations stemming from international conventions of the International Maritime Organization or the International Labour Organization such as the Safety of Life at Sea Convention, the ISPS Code, the 2006 Maritime Labour Convention (MLC 2006) or the Convention on Work in Fishing Convention (C188).

Installation of surveillance equipment is a manifestation of the employer's power of direction. This strengthens the ability of the employer to give orders and instructions to the employee, to assess its work, evaluate its capabilities, promote or take account the proper execution of the work contract. The employment contract characterised by the relationship of subordination expresses in fact the performance of work "under the authority of an employer who has the power to give orders and directives, to monitor implementation and to punish breaches of his subordinate"².

French law provides for the employer specific powers to be exercised in the interest of the company. Therefore, the legislator framed the power of direction or command of the employer as well as its normative and disciplinary powers. The bye-law has to be considered as the second source of the safety obligation, the first remaining statutory³. However, the oldest institution of labor law, including the rules of discipline within the company and transcribing the private regulatory power of the employer, cannot justify excessive or disproportionate restrictions to individual and collective rights and freedoms of workers⁴. Indeed, whether it concerns a land-based enterprise or a maritime enterprise, the bye-law can not provide for such restrictions on the rights of individuals and individual and collective freedoms which are not justified by the nature of the task nor proportionate to the objective (clothing, anti-alcohol testing...). It cannot thus contain discriminatory provisions (race, sex, political

² Ca Versailles, 10 oct. 2006, n°06/01090

³ Favennec-Héry F., « L'obligation de sécurité du salarié », Dr. Soc. 2007. 687.

⁴ Bouchet H., « A l'épreuve des nouvelles technologies : le travail et le salarié », Dr. Soc. 2002. 78.

opinion...). But it may restrict a fundamental right if this restriction is based on a rationale: the opening of the locker room of employees by the employer may be justified for reasons of safety or hygiene; the employee search can also be provided if the employee retains the opportunity to object and that privacy is duly respected. In the presence of a CCTV system, the bye-law should include a clause informing the staff of the existence of the device, after prior notice of the works council in case of change of the regulation⁵. The installation of a video surveillance system either in land-based premises or on board a ship is subject to the same rules protecting employees, particularly with regard to unfair terms of the bye-law⁶.

The monitoring of employees is pursuing simultaneously control objectives, security of work activities and commercial business. Technical developments have increased acoustic, electronic or optical means: video, geolocation, spyware, recording conversations... When technology extends the monitoring capabilities, law provides for guarantees regarding the use of these devices. Under the principle of proportionality, the company's interest must in fact take precedence over the protection of the workers' interests as illustrated by the performance recording. But second component of the principle, any monitoring and control system must be installed in a way minimizing damage to private and personal life of the employee.

If the employer has the right to control and monitor the activity of its employees during work time, recording – regardless of the grounds – would be void if it had been realised without their knowing⁷. The obligation to inform the employee of monitoring devices from its online activity (or for example internal regulations on internet use) shows the necessary search for a balance between individual interests and technical deployed means. The proportionality of the surveillance of workers does not necessarily distinguish the mobile and autonomous employee from the one working on a fixed site. Thus, the worker must be specifically notified of the use of any technical means of monitoring. Without prior information, recording data constitutes an illegal mode of proof⁸. This information requirement is even more important given the degree of autonomy of workers, whether or not itinerant, and the development of information and communication technologies. Today, this leads to interesting reflections about the very methods of practical determination of working time⁹. The means used to achieve effective supervision of employees and their activities include

⁵ TGI Lorient référé 26 décembre 1994, *Droit ouvrier*, nov.1995, 513.

⁶ Bogoratz S., Bauer C., « La vidéosurveillance du salarié : Pour une protection juridique nouvelle de son image et de l'intimité de sa vie privée », LEGICOM 4/1995, n°10. 14.

⁷ Soc. 20 nov. 1991 : hidden camera in the cash register, images rejected; Soc. 22 mai 1995 : prohibition of use of a monitoring device without noticing the employees; Soc. 14 mars 2000 : a contrario, lawful phone calls recording.

⁸ Cass. soc., 20 nov. 1991, Bull. civ. V, n° 519 ; D. 1992, Jur. p. 73, concl. H. Chauvy ; JCP éd. E 1991, Pan. p. 1431 ; RJS 1992, 25, n° 1, rapp. Waquet ; Dr. soc. 1992, 28 ; Planque J.-Cl., « Vers un assouplissement des conditions de licéité de la surveillance des salariés, Rec. D., 2002, 2292

⁹ Favennec-Héry F., « Qualité de vie au travail et temps de travail », Dr. soc. 2015. 113 ; Barthélémy J., Cette G., « Vers une approche plus qualitative de la durée de travail », Dr. Soc. 2015. 47

techniques and devices that have partially or completely replaced the historic foreman. In other words, the human supervision of the work of a subordinate has become technological, of course ensuring effective control of its operations and results, but also fulfilling the “safety obligation of result” (*obligation de sécurité de résultat* in French) of the employer.

The technical advances as to the surveillance of the employees’ activities have substantially transformed the employment relationship. As a generator of rights and obligations for both parties of the contract, this relationship should be read in light of employee surveillance measures that reveal the legal subordination (which is one of the three criteria of existence of the contract according the French law). These measures play indeed a key role in ensuring the effective implementation of employer’s orders and monitoring the results¹⁰. The employee surveillance is part of the powers of the employer¹¹, referring to the interdependence between work and salary providers. Thus, monitoring stems from the employer’s right of control, but is, furthermore, imperative since it results from the performance of the safety and prevention obligations. These two obligations cover different situations although they are both involved in worker overall safety: the safety obligation deals with the working conditions general framework; the obligation of prevention is especially considered in case of harassment.

The safety obligation focused initially on hygiene and safety rules (since a 1892 French law), that is to say the material conditions of work. Directive 89/391 of 12 June 1989 on health and safety at work states the general obligation of employer prevention, risk assessment, consideration of the material and immaterial conditions. Prevention requires thus the employer to be proactive¹². Prior to the consecration of the obligation of safety (*of result*), inappropriate safety measures might constitute a ground for criminal liability of the employer¹³. If the modalities of surveillance of employees at sea are different from the land-based ones, they are all part of the general safety obligation.

Considered as a way to optimize the performance of actual long-distance work performed under the leadership of the captain (representing the shipowner commercially operating the ship), on-board monitoring devices have not been designed in view of their effects on employees’ working conditions. Remote

¹⁰ Antonmattei P.-H., « Obligation de sécurité de résultat : les suites de la jurisprudence SNECMA », Dr. Soc. 2012. 491 ; Collet-Thiry N., *L’encadrement contractuel de la subordination*, thèse de droit, Univ. Paris II, sous dir. B. Theyssié, 2012, 249

¹¹ Aubert-Monpeyssen T., « La licéité des moyens de contrôle des salariés utilisés par l’employeur », D. 2001. 3015

¹² Radé C., « Harcèlement. Obligation de sécurité de résultat. Obligation de prévention », Dr. soc. 2010, 472

¹³ Cass. soc. 11 mars 1993, Bull. civ. V n° 85, 30 janvier 1997, n° 94-20.895 ; Chaumette P., « Accident du travail. Obligation de sécurité de résultat. Faute inexcusable (oui). Conscience du danger. Prévention insuffisante », Dr. soc., 2002. 676

monitoring, including the use of video surveillance systems, must be questioned in the light of its purposes and effects on the working conditions on board a ship. A cautious use of monitoring devices shall be observed, adapted to the particular nature of the ship as a workplace, where personal and professional lives of seafarers coexist (I) and given the multiplicity of the pursued objectives and the hypothetical disciplinary use of the collected data (II).

I. Adaptation of monitoring devices and conciliation of private and professional lives

As stated few years ago by P.-H. Mousseron, it seems important to mention the major characteristics of all human activity: “the space is with time an essential dimension of the relationship of human beings and their environment. The man did not escape this constant. Individuals and societies have a representation of space, use and shape this key determinant of their relationships”¹⁴. The relationship between the employer and the employee is no exception to this reality: labour law, including its maritime aspects, is full of spatial and temporal characteristics that are specific to employed activities. These relations are characterized by the need to reconcile the personal (“all the acts and behaviour of the employee”¹⁵) and professional lives¹⁶.

But is it possible to monitor the worker on board a ship as if he was land-based? The answer to this question is certainly negative, given the distinct reconciliation of professional and private lives, but also with regard to the different risk prevention practices since offshore activities are inherently more accident-prone. Therefore, the technical devices monitoring offshore employees must meet particular requirements. The reconciliation of professional and personal lives of the employee cannot be approached in the same way as in terrestrial studies, because the workplace is mobile and operates in a non-natural environment for humans (A). This variable geometry reconciliation at sea depends thus both on the very nature of the employed activities and on their effects on working time (B).

¹⁴ Paul-Henri Mousseron, « Le lieu de travail, territoire de l'entreprise », Dr. soc. 2007. 1110.

¹⁵ Favennec-Héry F., « Vie professionnelle, vie personnelle du salarié et droit probatoire », Dr. soc. 2004. 48 ; Waquet Ph., L'entreprise et les libertés du salarié – Du citoyen salarié au salarié citoyen, éd. Liaisons, 2003. 111

¹⁶ La notion de vie personnelle couvre les aspects ressortant de la vie privée : Dupays A. (dir.), Le Lamy social, Ed. Lamy, 2015. 199 ; v. Dossier spécial, in Dr. soc. 2004, n°1.

A. Surveillance and conciliation of lives in a particular workplace

The ship is not a workplace like any other. Isolated, subject to various navigation hazards, working time standing alongside rest time in a context of promiscuity, the ship gives rise to peculiar working and living situations. The links between personal and professional lives are becoming blurred especially as the worker cannot leave the workplace. Work at sea is inevitably different from land-based work: no other type of company requires of its employees a continuous and prolonged presence in the workplace, demanding them to ensure the safety of the mobile collective workplace and their personal lives.

Maritime security (“all rules aimed at preventing natural risks or risks caused by navigation”¹⁷), proceeds in the presence of a sufficient crew in number and quality checked before any boarding¹⁸. It refers primarily to the organization of work on board, which causes many consequences on the personal lives of employees on board where prevail the security measures. In a classical framework as to land-based activities, this observation does not hold as “the workplace is not an element of personal and family life”¹⁹. At sea, the continued presence of the employee at his place of work reveals the primacy of the safety issues: the ship is also part of the seafarer’s personal life during the rest periods. In land-based employed activities, the mental representation of the transition between professional and private lives is particularly visible because of real break times. At sea, this transmission is less apparent because the employee remains (contractually but also psychologically) responsible for the ship safety. Admittedly, the turnover is deemed to ensure continued safe navigation and provide the crew members a real recreational space allowing physical and mental recovery. However, especially in the fisheries sector, seafarers are never completely at rest. Fishermen are indeed subject to the fishing rhythm, lifting of the fishing gear... Similarly, and even more generally speaking, the ship's rescue duty overrides any regulatory provision about mandatory rest time²⁰.

The boundary between personal and professional life is also blurred due to a growing presence of surveillance equipment (cameras, geolocation devices etc...), which transforms the remote monitoring of human activities on board the ship and may take the form of a continuous assessment of the performed work. The phenomenon is well identified by studies on land-based employed activities. Its effects are nevertheless strengthened on board a ship. While CCTV extends the ability of remote observation of human activities in area further off shore, it allows the owner, *via* a security, routing and/or fleet management company, to assess the actual conditions anywhere

¹⁷ Leboeuf C., De la surveillance des activités humaines en mer. Essai sur les rapports du Droit et de la Technique., thèse droit, Univ. Nantes, 2013. 100 [en ligne] : <https://hal.archives-ouvertes.fr/tel-01150617>

¹⁸ Convention SOLAS, Règle 14.1 ; C. transp., art. L. 5522-2.

¹⁹ Hauser J., « Le lieu du travail ne serait pas un élément de la vie personnelle et familiale », RTD civ. 2000. 85.

²⁰ Code transp., art. L. 5542-35

on board – except the places of residence – who thereby can outline the measures to be implemented by the captain. Of course video surveillance might pave the way for better business management practices - revisiting the captain autonomy – but is also aimed at controlling employees behaviour. For instance, installation of CCTV devices on board fishing vessels to ensure compliance with the prohibition of discarding, remaining for the time being a project in the Skagerrak. However, a 2013 legislative resolution of the European Parliament showed the way towards a widespread use of fishing vessel remote monitoring systems: the “remote electronic monitoring system should be based on automated control; data should be handled in conformity with rules on data protection and be made available to research”²¹. This has not yet materialised, but such projects raise serious questions as to the real consequences of the use of monitoring devices on the seafarers’ working and living conditions.

B. Conciliation of lives in a time framework proper to the very nature of the employed activities

The working time organisation is inherent to the specific conditions of the employed activities. At sea, there are only two steps: the actual work and rest periods. “The maximum weekly working time, [as provided for in the French Labour Code] is not applicable to maritime companies”²². The interactions between work and personal life of the crew then act independently of the classical work-rest time segmentation. This finding is not only specific to offshore workers but concerns all mobile workers²³. However, working hours are specifically framed, taking into account the maritime labour requirements and characteristics.

The various exceptions to the general rules of work organization on board certainly reflect particularities related to the working environment and the nature of the employee's activities. Pursuant Decree No. 2005-305 adopted on 31 March 2005 about the working time of seafarers, the actual work time is defined as the time spent by personnel outside the living quarters on board, as a result of an order, being then available for duty. In general, work on board is organized on the basis of eight hours a day. Given the specific features of maritime work and depending on the sector, there

²¹ European Parliament legislative resolution of 16 April 2013 on the proposal for a regulation of the European Parliament and of the Council on certain technical and control measures in the Skagerrak and amending Regulation (EC) No 850/98 and Regulation (EC) No 1342/2008 (COM(2012)0471 – C7-0234/2012 – 2012/0232(COD)), 12.

²² Beurier J.-P. (dir.), *Droits Maritimes*, 2014, 3^e éd., Dalloz Action. n° 413.17 ; Chaumette P., « L’organisation et la durée de travail à bord des navires », DMF. 2003. 3. En effet, les articles L. 3121-35 et L. 3121-36 du code du travail ne sont pas applicables aux entreprises d’armement maritime. Pour les navires de pêche, le maximum est de 72 heures de travail pour une période de 7 jours (décret n° 2005-305 du 31 mars 2005, art. 7). Pour la Marine marchande : 84 heures maximales sur une période de 7 jours (12h x 7) ; Dans le transport de personnes, maximum 144 heures par périodes de 14 jours (décret précité).

²³ Belton L. et Coninck (de) F., « Des frontières et des liens. Les topologies du privé et du professionnel pour les travailleurs mobiles », *Réseaux* 2007/1, n° 140. 67.

are many exceptions to the rule: the maximum duration may be twelve hours or fourteen hours under an agreement of a collective agreement when the work is organized in cycles.

In special circumstances, the work period may be extended, for example in case of staff shortages following the landing of a seafarer who can not be replaced, during travel or when entering or leaving ports. Considering the very particular employed activities on board fishing vessels (“when fishing, fish order”), the master is free to postpone, shorten or even grant pause time. In this sector, the logic is indeed different: it is no longer a question of maximum working hours, but of a minimum rest period (set seventy-two hours per seven-day period). Finally, whatever the sector, during the rescue of the ship, its debris, shipwrecked items, shipment or any element security or safety-related elements (shipping, persons on board, assistance to a vessel...) the working time cannot be limited in time²⁴.

The links between the adequacy of number of staff members and the organization of work on board, safety, security and the shared-wages are part of a complex system. The balance of these different interests has effects on the health of employees and affects the conduct of the activity: fatigue, stress, addictive practices, overweight, hearing, respiratory, musculoskeletal, dermatological, cardiovascular problems... Notwithstanding the primacy of security, the balance of interests transcends the dichotomy of professional and private lives because the employee remains a seafarer at any moment of the journey and hence subject to occupational hazards in working time and during the rest periods.

The subrogatory nature of the risk at sea thus causes confusion between the lives of the employee. It involves the implementation of information, training and prevention mechanisms by the employer. These have to be adapted to the assessed risks, included notably in the single prevention document (*document unique de prévention*) or recommended by the professional risk assessment document, in accordance with the obligation of adaptation measures “to take account of changing circumstances and aim to improve existing situations”²⁵. The French Transport Code provides that the inherent adaptation to changed circumstances in the conduct of activities on board the ship shall be realised without prejudice to the responsibility of the captain. The latter shall indeed enjoy a full autonomy when assessing and then implementing the necessary safety measures on board. The captain is the keystone of the effectiveness of safety, whose pregnancy may be affected by the setting up of remote monitoring devices, used either by state authorities or routing companies for a variety of purposes.

²⁴ C. transp., art. L. 5544-13.

²⁵ C. trav., art. L. 4121-1

II. Multi-purpose monitoring devices and use of collected data

The monitoring devices, be they on board ships or in shore-based facilities, pursue a multitude of aims, in particular risk prevention (A). However the use of the collected data might reveal in practice a use for disciplinary purposes or disputes, far from enhancing the safety of workers (B).

A. The risk prevention through monitoring techniques

Many studies state the interconnections between electronic monitoring techniques and working conditions based on numerous reference elements: places, times, collective, work rhythms, intra- and extra-entrepreneurial cooperation, skills development and well-being of employees. These lead to the establishment of more or less strong links between information and communication technologies and the very working conditions²⁶. Studies on video surveillance generally conclude to behavioural changes of the company towards employees and vice versa. These changes are sometimes provided for in the applicable law, but lead most of the time to the enlightenment of legal constraints²⁷. Interactions between monitoring techniques and behavioural changes are indeed evolutionary and demonstrate the continuous “metamorphosis”²⁸ of working conditions facing a static law.

In practice, the risk analysis and the implementation of preventive measures reduce the harmful consequences of such interactions that affect the quality of the working conditions. The French Labour Code takes a holistic approach to prevention stating general principles (Article L. 4121-2) defining the assessment of risks that cannot be avoided. In accordance with the safety obligation, the risk assessment process shall identify all foreseeable risks, taking into account the state of development of techniques. Therefore, in view of the effects of the use of new surveillance technologies, the risk assessment process should recommend some adaptations to the supervisory practices. Moreover it is important to recall that pursuant art. L. 4121-1 (Labour Code), the employer must take all the necessary measures to ensure the safety and protect the physical and mental health of workers. However, given the lack of expertise on the hypothetically harmful effects of the technical surveillance on working conditions on board a ship, this assumption seems to be, for the time being, poorly considered.

²⁶ Greenan N., Hamon-Cholet S., Moatty F., Rosanvallon J., TIC et conditions de travail. Les enseignements de l'enquête COI, Rapport de recherche du CEE, 2012, 201 p.

²⁷ Radé C., « Nouvelles technologies de l'information et de la communication et nouvelles formes de subordination », Dr. soc. 2002. 26 ; Supiot A., « Travail, droit et technique », Dr. soc. 2002. 13 ; Combrexelle J.-D., « Droit du travail et nouvelles technologies de l'information et de la communication », Dr. soc. 2002. 103.

²⁸ Ray J.-E., « Métamorphoses du droit du travail », Dr. soc. 2011. 1162.

Further works on the consequences of surveillance must be conducted on the basis of various kinds of expertise coming notably from psychologists (about the subjective perception of employees) that are leading to the adoption of preventive measures, together with training and information measures. The psychosocial resilience of workers is certainly the major key element of the effectiveness of the surveillance systems. But today, only the legal obligation to inform any worker who is monitored pertains to this preventive logic. Imposed by the legislator, the information obligation intends originally to limit the regulatory power of the employer. In practice, it exceeds this sole purpose since it contributes to the acceptability and appropriation processes²⁹.

To be functional and efficient, the interest of the risk assessment shall be truly understood by the company, which is the entity responsible for the implementation of preventive actions. However, the origins and causes of multifactorial risks make it difficult to implement³⁰. Moreover, the employees themselves should understand the process. This is notably the aim of the training - some would say sensitization – of the captains to routing or tracking practices within the fleet-centres. Route guidance, sometimes experienced as injunctions by the captain (non compliance might led to internal disciplinary action), may be subjectively misunderstood. The immediacy of communication generates situations of misunderstanding and stress implying important psychological consequences, which directly affect the conduct of activities and the status of the ship captain³¹. The latter may indeed have the feeling of being under constant surveillance, its decisions being taken on the basis of external advice without limiting its liability, as is the case for maritime pilotage, in accordance with Rule 8, Chapter IX-2 of the SOLAS Convention. According to the case law regarding advice given by a maritime pilot, who assists the conduct of the vessel when entering of leaving port, the captain remains responsible for any damage³². As far as routing is concerned, limitation of liability is a question worth asking before a case gives rise to the consideration of the articulation of responsibilities³³. Would the captain be an autonomous employee, with a personal/civil liability?³⁴ Would he enjoy immunity³⁵

²⁹ Bobillier-Chaumon M., Dubois M., « L'adoption des technologies en situation professionnelle : quelles articulations possibles entre acceptabilité et acceptation ? », *Le travail humain* 4/2009 (Vol. 72) , p. 355-382.

³⁰ Van Wassenhove W., « Les obstacles à la gestion des Risques Psycho-Sociaux », *Gérer et Comprendre. Annales des Mines, Les Annales des Mines*, 2014. 30.

³¹ Leboeuf C., « Menaces et risques en mer. Implications juridiques de la surveillance satellitaire », *ADMO*. 2012. 137.

³² Laffoucrière F., « La responsabilité disciplinaire et pénale du pilote maritime », *DMF*, 2011. 103 ; « La responsabilité civile du pilote », *DMF*. 2008. 594.

³³ Vachias Y., « Routage météorologique. Le capitaine est-il toujours libre de son choix de route ? », *ADMO*, 2012. 115.

³⁴ Proutière-Maulion G., Fotinopoulou-Basurko O., « Harcèlements à bord des navires, le droit commun appliqué aux spécificités, *Rev. dr. transp.*, fév. 2010.

³⁵ Jourdain P., « Le préposé fautif victime de dommage peut-il se prévaloir de l'immunité résultant de la jurisprudence Costedoat ? », *RTD Civ.* 2014. 386.

in view of the changing relationship of subordination under the influence of new techniques and monitoring practices?

These questions, deferred to further works, lead us to consider the use of data obtained by geolocation, CCTV monitoring systems, etc... Even though such systems may be dedicated to only one purpose (monitoring of discarding or the commercial activity of the ship for example), they are actually vectors of a multi-objective optimization of the maritime surveillance³⁶. Collected either by private or public entities, data is indeed likely to be used for contentious or disciplinary purposes, far from the initial aims the systems were designed for.

B. The evidentiary value of systems monitoring workers at sea

The use of monitoring devices meets professional expectations of both the employer and mobile employees who enjoy a higher level of autonomy. But the consequences of use of data collected through a monitoring system can be important. The highly particular working environment on a ship, as being a workplace that moves outside the field of vision of any classic supervision mechanism, strengthens the necessity to consider the evidentiary value of data collection systems. The collected data can indeed provide evidence or at least visual clues of an accident that may provide the basis for sanctions or dismissal.

The company's policy determines the quality of the work environment. It includes necessarily measures as to monitoring employees. There is no discussion here of criticizing the employer's monitoring powers. However the practice should reflect a rationalization of processes, respecting the individual rights of workers in accordance with the principle of proportionality establishing a balance between means and interests. The lawfulness of the collected elements from a video surveillance system dedicated to the fight against illegal discards (devices filming the deck) or to the fight against piracy (corridors, bridge and ship's environment surveillance) seems therefore unquestionable when employees have been informed of the existence of such a device and if it is active only when it is really needed (when actually fishing or transiting in dangerous areas).

However, it is possible to believe that uses of data may be different from those initially considered by the monitoring system (design and framework). For example in the case of remote electronic surveillance as established by the proposal for a EU Regulation on fishing activities in the Skagerrak, withdrawn in March 2015, a controlled system was envisaged, whose terms and data collection would have been

³⁶ Leboeuf C., « Surveillance par drones et collecte de données. Nouveaux usages, nouvelles questions juridiques. », *Human Sea*, 4 nov. 2015, [en ligne] : <http://humansea.hypotheses.org/382>

defined by the Commission³⁷. The collected images would have been subject to treatment and automated backup. The system would also have used recognition software and human control would have intervened only in case of detection of irregularities (by the very system). The system is not exclusively designed for public control of activities at sea: fishermen would have been entitled to exploit collected data “for personal purposes such as monitoring of fishing effort to maximize the catch”³⁸. The ability to use these images for other purposes than the control of compliance with the prohibition of discharges has been expressly considered during the various stages of the ordinary legislative procedure³⁹. This option appears to be an incentive for professionals - not compelled – setting up such technical devices on board their ships. But it raises the essential issue of the use of such images for disciplinary purposes, as the automated process is not designed for the employer: only the use of the images would have been allowed for enhancement of the conduct and management of fishing activities.

It appears important to recall that under French jurisdiction, use of surveillance devices in the workplace is subject to a preliminary declaration to the Commission for Data Protection and Liberties (CNIL). This video surveillance generally covers entrances, exits, hallways, but not the workstations. Video surveillance of the ship's deck poses hence a difficulty since the deck is the working platform of a part of the crew. Authorizing a specific purpose, European regulations would have led to exclude the application of certain provisions of Law No. 78-17 of January 6, 1978 relating to data, files and liberties, without voiding it of its substance and interest. Indeed, the letter of the law is not ruled out: the employer must exercise adequate supervision respectful of employees' privacy⁴⁰. But in practice, the purpose of monitoring devices is not always subject to strict judicial control⁴¹.

This does not mean that the conditions of legality of the use of such images are dwindling. Video recordings are a legitimate form of evidence⁴² since the existence of the video surveillance system was brought to the attention of employees⁴³ or when the adversarial principle is observed in the contentious phase⁴⁴. Moreover, the principle of

³⁷ Proposal for a Regulation of the European Parliament and of the Council on certain technical and control measures in the Skagerrak and amending Regulation (EC) No 850/98 and Regulation (EC) No 1342/2008 /* COM/2012/0471 final - 2012/0232 (COD), art. 11

³⁸ *Ibid.*

³⁹ The possible use of collected data by the enterprise contributes necessarily to the acceptability and acceptance of the system.

⁴⁰ C. trav., art. L 1121

⁴¹ CA Poitiers, 9 nov. 2011, n° 10-02505 ; CA Rennes, Ch. 8, 18 mars 2011, inédit, n° 157, 09/06999.

⁴² Soc. 2 févr. 2011, n° 10-14.263.

⁴³ Mouly J., Savatier J., « Droit disciplinaire », Répertoire de droit du travail, Dalloz, 2015. 94.

⁴⁴ Trib. adm. Dijon, 12 juin 2012, AJ pénal 2012. 557.

loyalty is imposed on any employer using data to impose sanction, even though they would demonstrate a criminally reprehensible misconduct⁴⁵.

Finally, it should be noted that the use of monitoring devices questions the autonomy of seafarers in carrying out their missions. Some recognize that “the employer must also be consistent. Once full autonomy is granted to the worker as to the organization of its work, monitoring is no longer needed to be”⁴⁶. This idea may perhaps be of interest with regard to on-shore activities. It is not justified for activities at sea, taking into account the safety requirements from both the French national law and international maritime conventions and especially because the autonomy is not granted by the employer but is a feature of maritime labor. Monitoring implies limited autonomy and creates new form of subordination. In this sense, the conception of the master’s supervision, being chief on board under constant surveillance, is very modern. Autonomy of the crew, initially based on the isolation of the ship, seems to be now limited to the management of emergency cases. The crew must indeed act as fast as possible in case of an unforeseeable event that cannot be controlled by orders of the technical office.

However, notwithstanding the intra-sectoral particularities, maritime labour is one of the most accident-prone activities in transport and industry sectors⁴⁷. CCTV might provide a documented response to industrial accidents and occupational diseases, especially in case of aggression. Proving the presence or absence of the employee at the workstation, performing actual work... CCTV brings visual pieces of evidence. Moreover, it is quite permissible to believe that the use of records is now operating in internal investigations to shipping companies but appears to be never challenged given the absence of litigations.

⁴⁵ Mouly J., Savatier J., « Droit disciplinaire », op. cit.; Cass., ass. plén., 7 janv. 2011, n° 09-14.316, D. 2011. 562, note Fourment.

⁴⁶ Bossu B., Morgenroth T., « La géolocalisation ne doit pas être détournée de sa finalité », Rev. trav. 2012. 156.

⁴⁷ Service de santé des gens de mer, Accidents du travail et maladies professionnelles. Bilan 2013, édité par Ministère de l’Écologie, du Développement durable et de l’Énergie, 2014.